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No. 740

In the

Supreme Court of the United States

OCTOBER TERM, 1964.

JOHN BLAAUW, a minor, by Gerhard Blaauw, his father and next friend, and GERHARD BLAAUW,

Petitioners.

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

The petition for a writ of certiorari should be denied because it presents no questions worthy of review under the standards of Rule 19 of this Court.

The three alleged questions presented (Petn. 3) are purely questions of Illinois law that relate to a General Order of the Illinois Commerce Commission and its alleged effect on a claimed duty of respondent to fence its right of way in the City of Chicago under an ordinance passed in 1890. It would be difficult to imagine questions more peculiarly local in their nature. And even if they were resolved in favor of petitioner a reversal of the

judgment of the Court of Appeals would not be required. In support of the jury's verdict, and District Court judgment, respondent advanced other points but the Court found it unnecessary to consider them saying, "We have considered, but need not discuss, the other points raised" (Petn. 27).

This Court is asked to grant the writ because the decision of the Court of Appeals allegedly conflicts with a later decision of an Illinois Appellate Court in *American National Bank and Trust Company* v. *The Pennsylvania Railroad Company*. The Illinois Appellate Court, however, said:

> "We find no conflict between the views presented here and those presented by the United States Court of Appeals for the Seventh Circuit in the recent case of *Blaauw* v. *Grand Trunk Western Railroad Company*, 333 F. 2d 540" (Petn. 53).

Petitioner thus is in the anomalous position of invoking a subsequent decision as the basis of a conflict and at the same time contending the Court is wrong when it says that a conflict does not exist. Surely, the express statement of the Illinois Court that no conflict exists should settle the question.

STATEMENT.

Petitioner's Complaint against defendant was in two counts. Count I was based on common law negligence; Count II was under an 1890 ordinance of the City of Chicago, repealed in 1939 (Secs. 1-1, 1-16, Municipal Code of Chicago, 1939), but allegedly continued in force by General Order 121 of the Illinois Commerce Commission. Petitioner claimed that under the Ordinance and Order defendant had a duty to construct and main-

tain a fence at the place of the accident. The District Court directed a verdict for respondent as to Count II. Count I was submitted to the jury which returned a verdict in respondent's favor. On petitioner's appeal the Court of Appeals upheld the jury's verdict on Count I and held that the District Court did not err in directing a verdict as to Count II. As to this Count it held:

(1) The 1890 Chicago ordinance had been abrogated by the Public Utilities Act of Illinois, originally passed in 1913 and re-enacted in 1921;

(2) That General Order 121 of the Illinois Commerce Commission, entered in 1926, which continued the "operations and practices" of utilities under municipal police regulations had been rescinded by General Order 138, passed in 1937;

(3) That plaintiff could not collaterally attack the validity of General Order 138 on the grounds of certain alleged procedural errors.

Because of the ruling it made in regard to General Order 138 the Court of Appeals had no occasion to consider: (1) Whether defendant ever had any obligation to fence its right of way at the place of the accident under the 1890 ordinance; or (2) whether General Order 121 required respondent to fence its right of way because that order continued only operations and practices of public utilities which were in existence at the time of its entry and there was no evidence that respondent had ever established the practice of fencing its right of way at the place of the accident; and (3) assuming General Order 121 purported to require respondent to fence at the place of the accident, whether it was valid, as a matter of statutory or constitutional law, because it was entered without notice to the railroads, and without hearings of any kind.

REASONS FOR DENIAL OF THE WRIT.

I.

The Appellate Court of Illinois Has Expressly Stated That There Is No Conflict Between Its Decision In American National Bank and Trust Company v. The Pennsylvania Railroad Company And The Decision Of The Court of Appeals In This Case.

Rule 19 of this Court provides that certiorari will be granted "only when there are special and important reasons therefor." The rule states that among the character of reasons that will be considered is "Where a court of appeals • • • has decided an important state • • • question in a way in conflict with applicable state • • • law."

Hence, before this Court will review a decision of the Court of Appeals on a question of state law it must be shown: (1) The question is *important*; (2) The decision conflicts with applicable state law.

The questions presented by the petition meet neither test. Essentially, they relate to the interpretation and validity of two general orders of the Illinois Commerce Commission to the extent they may deal with the fencing of respondent's right of way at the place of the accident.

Under their diversity jurisdiction, Federal courts are frequently called upon to determine state law. In the quarter century since *Erie Railroad* v. *Tompkins*, 304 U.S. 64, the instances in which this Court has granted the writ to determine whether a Court of Appeals has misapplied state law are almost nonexistent. There is no question of state law presented by the petition that is so important as to impel the Court to depart from its customary procedure of permitting these questions to be finally determined by the Court of Appeals.

The primary reason asserted for granting the writ is that the decision of the Court of Appeals conflicts with the decision of the Illinois Appellate Court in *American National Bank and Trust Company* v. *The Pennsylvania Railroad Company*. In the *Pennsylvania Railroad* case a child was run over by a freight train which he had boarded, while attempting to alight therefrom. Plaintiff relied upon a *special contract* ordinance of Chicago, which required the railroad to fence at the place of the accident. The Illinois court recognized that the ordinance had been invalidated by the passage of the Illinois Public Utilities Act of 1914 and 1921, but held it had been continued in force by General Order 121 of the Illinois Commerce Commission passed April, 1926, which ordered "that the practice and operations established and maintained" by each public utility as of October 28, 1925, be continued "as the practices and operations of such utility" (Petn. 58). On July 19, 1937, the Commerce Commission ordered that General Order 121 "to the extent that it applies to railroads, is superseded and rescinded by General Order 138" (Petn. 61). In the Court of Appeals petitioner contended only that General Order 138 was invalid because of certain procedural errors but the Court held that the order was "not subject to collateral attack (Petn. 27). The Illinois Appellate Court held that the special contract ordinance (not involved as to respondent) was continued in force by General Order 121 and was not repealed by General Order 138. Its attention had been called to the decision of the Court of Appeals and it specifically said that there was no conflict between its views and the view of the Court of Appeals, as has been noted above (Petn. 53). This should settle the issue of supposed conflict. We doubt that this Court has ever been confronted with

a situation where an alleged conflicting decision has expressly stated there was no conflict. We submit, that the claim of conflict is completely devoid of merit.

II.

The Petition Should Be Denied Because Even If The Questions Allegedly Presented Were Decided In Favor Of Petitioner The Judgment Of The Court Of Appeals Would Have To Be Affirmed.

Only narrow questions of Illinois law are presented by the petition. But, even if they were resolved in favor of petitioner the judgment of the Court of Appeals would have to be affirmed. As already noted, respondent advanced a number of reasons why it had no duty to fence at the place of the accident. Because of the conclusion it reached, the Court of Appeals had no occasion to consider them (Petn. 27). Although we do not think that an answer to a petition for a writ of certiorari is a place to argue, at length, narrow and obscure questions of local law, we believe that some mention should be made of these other points to show the futility of granting further review of the three questions urged.

General Order 121 of the Illinois Commerce Commission ordered that the "practices and operations established and maintained" by each public utility in the State of Illinois as of October 25, 1925, in compliance with any ordinances "are hereby ordered established, continued and maintained as the practices and operations of such utility from and after the date of this order until the further order of this Commission" (Petn. 58). The location of petitioner's accident was at 77th Place and Central Park Avenue in the City of Chicago. At the time of the 1890 ordinance and until a few years before the accident, this was unbroken prairie (A. 93).

Accordingly, respondent never installed any right of way fences. Petitioner never introduced any evidence that respondent had any "practice" of fencing its right of way at the place of the accident at the time of the issuance of General Order 121. For this reason alone, the question of whether General Order 121 was rescinded by General Order 138 is academic because General Order 121 never required respondent to fence at the place of the accident.

Again, there is no evidence that respondent or its predecessors received a notice from the municipal authorities to fence at the place of the accident. Another independent ground for sustaining the Court of Appeals judgment is that, under the ordinance relied upon, an obligation to fence arose only after notice by the mayor or commissioner to fence at a particular place, and no proof of notice to fence at the place of the accident was given. See *Curran* v. *C. & W. I. R. R. Co.*, 289 Ill. 189. In this respect the instant case is different from the case of the *Pennsylvania Railroad Company*, relied upon by petitioner. There the plaintiff relied upon a special contract ordinance of January 18, 1897, which required the accepting railroads to either build retaining walls or fences in accordance with the general fencing ordinance of 1890.

Finally, General Order 121 shows on its face that it was issued because of the decisions of the Supreme Court of Illinois in *Village of Atwood* v. *C. I. & W. R. Co.*, 316 Ill. 425, and *Northern Trust Company* v. *Chicago Railway Co.*, 318 Ill. 412, both decided in 1925 (Petn. 56). It recites that by the above decisions it would appear that certain police regulations by various municipalities of Illinois have become inoperative; that an order should

be entered pending a survey of municipal police enactments regarding public utilities. The Commission, therefore, ordered that the practices and operations established and maintained as of October 28, 1925, be "ordered established, continued and maintained as the practices and operations of such utility from and after the date of this order until the further order of this Commission" (Petn. 56-58). General Order 121 shows on its face that it was issued without (a) notice to anyone, (b) hearings, or (c) the taking of evidence (Petn. 57). The Illinois Commerce Commission's sole authority for issuing general or special orders respecting safety practices of public utilities when the 1926 order was entered was found in Section 57 of the Public Utilities Act of 1921 (Smith-Hurd Ill. Rev. Stats. 1927, Ch. 111⅔ § 61), which required a hearing before the Commission could issue safety orders. General Order 121 is invalid as a matter of statutory law because no hearing was ever held as the Illinois statute required.

Moreover, General Order 121 is invalid as a matter of Federal Constitutional law. An administrative agency, in purporting to bind public utilities to continue their established safety acts and practices, acts in a quasi judicial capacity. Under the Illinois Public Utilities Act a corporation can be heavily fined and natural persons fined and imprisoned for violating orders. Ill. Rev. Stats. Ch. 111⅔ Par. 80, 81. This Court has settled that where an administrative agency acts in a quasi judicial capacity a hearing is essential to due process and if such a hearing is not given the agency order is void. *Londoner* v. *Denver*, 210 U.S. 373; *Morgan* v. *United States*, 304 U.S. 114; *Southern Railway Co.* v. *Virginia*, 290 U.S. 191.

In the *Pennsylvania Railroad* case, the Illinois Appellate Court assumed the validity of General Order 121, apparently because it was never questioned.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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